affidavits at the eleventh hour thus causing surprise and necessitating time for consideration of the same and reply by affidavit resulting in the application in question having to be adjourned repeatedly and so causing delay, wastage of judicial time and costs. I do not reckon that the Rule Committee in introducing Rule 13(2) intended that its provisions should apply to the well entrenched and I would say more stringent procedure applicable to O. 14.

Order 32 r. 3 of the Rules is in *pari materia* with the same numbered English rule which, disregarding the exception therein, reads as follows:

> ... unless the Court otherwise orders or any of these rules otherwise provides, a summons must be served on every other party not less than two clear days before the day so specified.

In the **Supreme Court Practice 1993,** Vol. 1, paragraph 32/1-6/8 it is stated in reference to the words "unless the Court otherwise orders" that a summons under O. 14 r. 1 is an exception to Rule 3 last referred to. It follows by analogy that Rule 13(2) does not apply to an O. 14 application.

For the reasons abovestated I find that the provisions of O. 32 r. 13(2) of the Rules of the High Court 1980 do not apply to proceedings brought under O. 14 of the said Rules or to affidavits filed or intended to be filed thereunder. Accordingly the defendant's affidavit herein stands filed as of right and if the plaintiff wishes to file an affidavit in reply thereto the plaintiff will need to obtain the leave of the Court so to do.

PUBLIC PROSECUTOR

v.

ALCONTARA

HIGH COURT, PENANG
TUAN VINCENT NG KIM KHOAY J.
[CRIMINAL TRIAL NO. 47(58)-39-88]
18 JUNE 1994

CRIMINAL LAW: Charge of trafficking in cannabis - Dangerous Drugs Act 1952 s. 39B(1)(a) - Whether plant material contained cannabis resin large enough to be used in the manner prohibited by the Act - Quantitative test - Finding by chemist of mere presence of cannabis resin in plant samples - Whether definition of cannabis under old s. 2 of the Act proved.

CRIMINAL PROCEDURE: Charge of trafficking in cannabis - Dangerous Drugs Act 1952 s. 39B(1)(a) - End of defence case - Reasonable doubt test - Defence that accused was under the belief that he was conveying fish keropok - Whether reasonable and probable.

EVIDENCE: Conviction on circumstantial evidence - Whether Court to be guided by best evidence rule - Finger print evidence - Whether a strict requirement.

EVIDENCE: Expert evidence - Evidence of chemist - Probative value thereof - Whether comparative approach to such evidence ought to be adopted.

The accused herein was charged with an offence under s. 39B(1)(a) Dangerous Drugs Act 1952 (the Act) for trafficking in 70952.1 grams of cannabis. He was acquitted by the High Court without his defence being called on the sole ground that the prosecution had failed to prove at the close of its case that the offending item was cannabis as defined under the old s. 2 of the Act. On appeal by the Public Prosecutor to the Supreme Court, the High Court's decision was overturned and while reverting the case back to the High Court for continuation of hearing, it was ordered that the accused be called to enter upon his defence.

The accused in his defence did not deny that at the time of arrest he was the sole accupant of the car wherein the said cannabis were found, but contended that he was labouring under the belief that he was only conveying fish keropok. At the end of the defence case, Counsel for the accused raised three main issues which he alleged were sufficient to entitle the accused to an acquittal.

1. That it had not been proved beyond reasonable doubt that the plant material examined by the chemist herein contained not just some minute or traces of cannabis resin, but which is large enough to be used in the manner prohibited by the Act so as to bring it within the ambit of the old definition in s. 2 of the Act.

2. That, as the Court, when acquitting the accused, had not considered whether it had been proved beyond reasonable doubt that the accused had sole possession, control and custody of the offending item, the Court could not now call the defence as none of the presumptions under the Act had arisen.

3. That in any case the story of the accused in the circumstances was probable and a doubt thus existed as to warrant his acquittal.

Held:

[1] It is wholly legitimate for the Court to compare a chemist's evidence in a given case with his evidence in another case or to juxtapose and measure his evidence with the recorded evidence of another chemist or other chemists in similar cases, in order to determine the probative value of his evidence. And by the same token the Court ought, particularly in a capital charge, to require such chemists to justify scientifically their expert view that the plant sample came within the definition of s. 2 of the Act.

[2] Although this Court had made a finding earlier that the chemist (PW1) in this case had neither directed his mind to nor evaluated the quantitative presence of cannabinoids in the resin, and therefore it is not now open for this Court to say that the said chemist had found cannabinoids which is "more than insignificant traces" or "which is large enough to be used in a manner prohibited by the Act", it is nevertheless self evident in the judgment given therein, that the Court was satisfied that from the Dequinois Levin test and the Thin Layer Chromatography test he had carried out, PW1 had in fact found the presence of cannabinoids in the plant sample. With the Court's acceptance that the chemist had found the presence of cannabinoids in the resin of the plant sample from P3 to P10, it would be highly incredible and inconsistent with common sense to hold that the presence of cannabinoids could not have been "more than insignificant traces" or "large enough to be used in the manner prohibited by the Act", had the chemist examined them with the view to determining this issue. Be that as it may the defence contention on this point, though undrstandable, is no longer pertinent or permissible now for this Court to consider as the issue had been laid to rest by the Supreme Court.

[3] This Court, in its earlier judgment, had not made any findings regarding the circumstantial evidence of possession, control and custody and hence this Court cannot do so now retrospectively so as to come to accord with the subsequent decision in Khoo Hi Chiang. Nevertheless, considering the fact that the Court had not found any of the prosecution witnesses, save PW1, to be lying in material particulars, this Court is satisfied that at the end of the case for the prosecution, that if their evidence, other that that of PW1, remained unrebutted, the circumstantial evidence would have been strong enough to warrant a conviction of the accused on a beyond reasonable doubt basis.

[4] Though the material portions of the accused's statements to the police appear to corroborate the accused's testimony in Court, the Court would still have to consider whether the story of the accused is probable even if not compellingly credible in the circumstances. The answer in this case must be in the negative as the facts showed that his story was riddled with inconsistencies when compared and marked by absurdities even when consistent. Here is a case where the accused wanted the Court to accept a story that he went to Che Mat's house at 7.00 pm from Taiping, arrived at 10.00 pm and slept there alone until 5.00 am the next morning in order to transport keropok to Che Osman in Kuala Lumpur for a fee of RM300, despite the fact that the nature and structure of keropok and cannabis could not be more different and despite only RM 63 was found in his pocket at the time of arrest. It is also wholly incredible for the accused not to have examined the contents in the boot of the said car before he set out on that long journey. On top of that the issue relating to the existence of Che Mat had never been raised by the defence though it is incumbent on the defence to at least put this question to the investigating officer. This failure could only mean that the

character Che Mat was only a figment of the accused's imagination plucked from the air while he was obliged to sit in the lock-up.

[5] The prosecution had succeeded in building an absolutely overwhelming circumstanstial case of exclusive possession, custody, control and knowledge of P3 to P10 against the accused, which the accused had not succeeded by his testimony to raise a reasonable doubt. The explanation of the accused is not only improbable and unreasonable but also inconsistent with innocence.

[Accused found guilty, convicted and sentenced to death].

Cases referred to:
PP v. Alcontara [1992] 1 MLJ 140 ***(refd)***
Loo Keck Leong v. PP [1992] 3 CLJ 1332 ***(refd)***
PP v. Alcontara [1993] 3 MLJ 568 ***(refd)***
PP v. Peter Yeoh & Anor. [1993] 1 CLJ 78
Kumaguru a/l N. Muniandy & 2 Ors. v. PP [1993] 2 AMR 50 ***(refd)***
PP v. Ibrahim bin Ariffin [1993] 2 CLJ 529 ***(refd)***
PP v. Chee Kon Fatt [1993] 3 CLJ 2564 ***(refd)***
Ramaya v. PP [1986] 1 MLJ 301 ***(refd)***
PP v. Choo Yee Keang [1991] 3 CLJ 2909 ***(refd)***
PP v. Lim Ah Bek [1989] 2 CLJ 1090 ***(refd)***
Mohd Radhi bin Yaakob v. PP [1991] 3 MLJ 169 ***(refd)***
Mat v. PP [1963] MLJ 263 ***(refd)***
Kahar a/l Tongah v. PP [1992] 4 CLJ 1865 ***(refd)***
PP v. Lin Lian Cheng [1992] 1 CLJ 2086 ***(refd)***
PP v. Saddali bin Sariol & Anor. [1993] 2 CLJ 263 ***(refd)***
PP v. Datuk Haji Harun ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 180
Dangerous Drug Act 1952, ss. 2, 39B(1)(a), (2)

For the accused - Karpal Singh; M/s Karpal Singh
For the public prosecutor - Ishak bin Yusof

JUDGMENT

Vincent Ng Kim Khoay J:
The accused was charged as follows:

> Bahawa kamu pada 11 Ogos 1987 jam lebih kurang 5.30 pagi di Jambatan Permatang Tok Labu, Kepala Batas, Seberang Perai, dalam Daerah Butterworth, di dalam Negeri Pulau Pinang, telah mengedar dadah berbahaya iaitu 70,952.1 gram ganja dan kamu telah melakukan suatu kesalahan di bawah s. 39B (1)(a) Akta Dadah Berbahaya 1952 (Semakan 1980) dan boleh dihukum di bawah s. 39B(2) Akta yang sama.

This case was first heard on 4 November 1992. The prosecution called and led evidence from nine witnesses. The nature and salient details of their evidence is as I have narrated in my earlier judgment (my said judgment) delivered on 27 November 1992 [see *PP v. Alcontara* [1992] 1 MLJ 140] which I do not propose to repeat here.

At the close of the prosecution case Mr. Karpal Singh, for the accused, took up only one point in his submission that the defence should not be called, namely that considering the evidence of the Government Chemist Encik Tai Teik Siew (PW1) in the light of the Supreme Court's decision in *Loo Keck Leong v. PP* [1992] 3 CLJ 1332, the essential ingredient of the charge - being that the plant material seized was cannabis as defined under the then governing definition (old definition) in s. 2 of the Dangerous Drugs Act (DDA) had not been made out by the prosecution at the end of the prosecution case.

I had in my said judgment held in favour of the defence on this point and acquitted and discharged the accused without calling him to enter upon his defence. The prosecution appealed. The appeal was allowed by the Supreme Court on grounds as appeared in *PP v. Alcontara* [1993] 3 MLJ 568 (the Supreme Court decision), and as ordered by the Supreme Court the accused was called by this Court to enter upon his defence.

At the hearing of the defence case on 12 May 1994, the accused gave the following testimony and did not call any witness.

The accused (39 years of age at trial) was, at the time of his arrest residing with his wife Anneedlzevet a/p Stephen (PW6) at No. 600, Batu 2 ½ Jalan Simpang Lawan Kuda, Taiping, Perak and was running his own pickle and keropok business. He then owned a car bearing registration number WBE 2789 (the said car) which he had registered under the name of PW6. On 10 August 1987 at about 7.00 pm his friend named Che Mat telephone him from Penaga, Butterworth, Penang to collect a consignment of keropok. Che Mat was a supplier of keropok who used to supply keropok to him to enable him to retail. Che Mat had been known to him for 6 to 7 months, but only as a business-friend. The accused was to earn RM300 as fee for services to be rendered on the said consignment of keropok, though his amount was not specifically mentioned during the phone conversation. The accused did not

know the full address of the house where Che Mat stayed but he had been to Che Mat's house before to buy keropok. Immediately after the telephone conversation he drove the said car from Taiping at 7.00 pm and reached Che Mat's house at 10.00 pm. Che Mat was present in the house and the latter instructed the accused to send a quantity of keropok to one named Encik Osman in Selayang, Kuala Lumpur. He had been to Osman's place once before. There, at Che Mat's house, Che Mat instructed the accused to wait in his house while he borrowed the said car from the accused to collect the keropok from another place. The accused then remained in Che Mat's house, watched television and fell asleep therein. The boot of the said car was empty when the accused left Taiping for Kepala Batas. Che Mat only returned to his house at 5.00 am the next day i.e. 11 August 1987. As soon as Che Mat arrived he awoke the accused out of his sleep and prepared drinks for both of them. After they had their morning drink, Che Mat informed the accused that he had loaded keropok in the car and instructed him to send same to one Encik Osman in Taman Selayang Utama, Jalan Besar, Kuala Lumpur. The accused then left for Kuala Lumpur. At that material time he did not check the boot of the car as he had believed Che Mat. While he was on the way he had to cross a bridge where he noticed a few drums arranged in a row. As he reached the bridge he saw a drum being pushed down to block his path and a man who identified himself as a police officer, took his car key and instructed him to follow him to the back and open the boot of the said car. When the accused opened the boot he saw some things which he thought was keropok. He said that he voluntarily came out of the car and denied PW3's assertion that the latter had to pull him out of his car when he refused to come out. There were then about 3 to 4 police personnel and all of them including the police officer who had identified himself were in plainclothes. He was promptly handcuffed and taken to the police station. At the police station the next day, a statement was taken by Insp. Mohan Nadason. He said he gave this statement voluntarily, as from the time of arrest until the statement, no caution had been administered to him by the police. This statement, which the accused said, was a true statement, was then tendered by the defence and marked as D14. At this juncture I would interject to note that certain statements in D14 (spelt out in my notes) were expunged from the record on the application of Mr Karpal Singh with the approval of DPP Encik Ishak Yusof, due to the defence contention that no caution had been administered. The accused again repeated that he did not know there was any offending items in the boot of his car when he left from Penaga Kepala Batas at 5.00 am on 11 August 1987.

In cross-examination by the learned DPP, the accused said the keropok he had referred to was sold in bars at RM3 per bar and not by weight and he had been buying the keropok in its raw (unfried) state. He agreed that since keropok was made with fish paste it would emit a fishy smell but not if it was wrapped tightly. And, though the said car was purchased by his wife to transport foodstuff for sale, on 11 August 1987 the wife did not do any business because she was then seven months pregnant. He agreed that when he was about to leave for Penaga, Kepala Batas he had only RM65. When the DPP referred to D14 to him, he also agreed that Che Mat gave him RM300 before he left Che Mat's house. The accused also said that when he left Taiping for Penaga, he did not inform his wife where he was going or that he was going to Kuala Lumpur, as she had already left the house at 5.30 pm on 10 August 1987 together with his younger brother and his child for his brother's house, which was located about half mile from his house. In re-examination by his Counsel he said that the contents of the search list were not explained to him and he gave the telephone number of Che Mat as number 352451 in D14. He further said that he did not know what happened to the RM300 and perhaps it was taken by police personnel.

With that, the defence closed its case.

At the end of the defence case Mr Karpal Singh in his submission urged the Court to acquit the accused on the following grounds, which in essence are as follows:

(A) The accused was acquitted at the close of the prosecution case on a technical point, namely that it had not been made out that the offending item found was cannabis as defined under the old s. 2 of the DDA; this being the sole issue raised by the defence. It is now essential, after the recent

decision in Khoo Hi Chiang [1994]; SCR 72 to consider whether:

(i) Upon a maximum evaluation of the evidence of PWl, it has been proved beyond reasonable doubt that the plant material examined by the chemist contained not just some minute or traces of cannabis resin, but which is large enough to be used in the manner prohibited by the Act; to bring it within the ambit of the old definition in s. 2 of the DDA as freshly interpreted in the said Supreme Court decision in this case.

(ii) Again upon maximum evaluation and as none of the presumptions under the DDA had arisen, this Court could not in any event have called the defence, as it had not at that time considered whether it had been proved beyond reasonable doubt that the accused had sole possession, control and custody of the offending items (P3-P10) found in the boot of the said car.

(B) According to the investigating officer Encik Ismail bin Din (PW8) the plastic packing of the offending items were not dusted for fingerprints, and the best evidence requirement is even more essential if the Court was to convict on the basis of circumstantial evidence.

(C) The Court should apply the *ratio decidendi* in the case of Leong Bon Huat [1993] 3 MLJ 11 as PW1 only took 80 to 160 grams of the sample from the whole bulk of 70,952.1 grams of plant material which would mean that under 200 grams and a maximum of only about 0.22% of the bulk

(D) The material particulars of what the accused said in D14 was corroborative and consistent with his oral testimony in Court. This story was also probable, could be true and a doubt thus existed to warrant his acquittal.

In regard to contention A (i):

I had, before acquitting the accused earlier, adopted the same approach as in my earlier judgments (even pre Khoo Hi Chiang); namely that there are certain elements of the ingredients of the charge which are not of the rebuttable kind envisaged under s. 180 of the Criminal Procedure Code. Such elements, as I had said earlier would have to be proved beyond reasonable doubt at the end of the prosecution case; and whether the offending items came within the old definition in s. 2 of DDA is one of such elements. See my judgments in *PP v. Peter Yeoh & Anor.* [1993] 1 CLJ 78 at page 82. Paragraph (g) Rt., and *Kumaraguru a/l N. Muniandy & 2 Ors. v. PP* [1993] 2 AMR 50 - p. 3492 at p. 3502 - paragraph 30 and also my said judgment in this case (*ibid*) at page 148 paragraph D to E.

Indeed, it was precisely my application of the beyond-reasonable-doubt-standard-of-proof test that had resulted in my finding of fact that PW1 had not directed his attention or mind to the **quantitative presence** (not mere presence) of cannabis resin in the plant samples from P3 to Pl0 that he had examined. This finding of fact was based on my observation of his demeanour and evasive manner of giving his evidence. [See page 144 paragraph E to F, D to E and page 148 containing the words "...even if accepted by me (which I do not)..." under 'b].

As government chemists testify only to assist the Courts in the field of their expertise and on results of analysis which purely involve matters of science, it is wholly legitimate for the Court to compare a chemist's evidence in a given case with his evidence in another case, or to juxtapose and measure his evidence with the recorded evidence of another chemist or other chemists in similar (e.g. drug) cases, in order to determine the probative value of his evidence. And by the same token the Court ought, particularly in a capital charge, to require such chemists to justify scientifically their expert view that the plant sample came within the definition in s. 2 of the DDA; it should not be just by their mere saying so. In this regard (indeed, considering the human weakness displayed by PWl here), it is patently unfair to require the defence to call their own chemist to rebut evidence of the Government chemist, unless the defence challenges the propriety of the method of analysis employed by the Government chemist.

Government chemists have time and again in the past, quite readily testified in my Court that none of the four tests employed by them were designed for determination of the quantitative presence of cannabis resin. It is the

presence of cannabinoids in the resin that makes the resin an offensive substance for being cannabis resin; many plants (e.g. gajus plant) exude resin and resin from cannabis plant does not bear any consistency or molecular structure peculiar to itself; the DLT and TLC tests are colour sensitive and positive-spots tests respectively, whereby the mere presence of cannabinoids, irrespective of quantity would produce a colour change (for DLT) and positive spots (for TLC) such that this, together with the other two tests, would (pre Loo Keck Leong) confirm the plant material to be cannabis plant as defined under the old s. 2 of the DDA [See my judgment and the recorded evidence of the Government Chemist in *PP v. Ibrahim bin Arifin* [1993] 2 CLJ 529 - Supreme Court Criminal Appeal No. 05-22-93 (pending)].

As I understand it, besides the first and second tests by visual examination the other two tests turned on the presence of cannabinoids in the resin rather than the resin per se. The first test was to determine whether the plant material were all of the same type. The second test by stereo microscope was intended (even at the time PW1 did his tests) principally to detect the presence of glandular and systolithic hairs in order to confirm that the plant material bear the morphological features of cannabis plant. This test was not meant to detect the extent of the presence of cannabis resins for the simple reason that though a stereo microscope can detect the presence of resin - which is a non offensive ingredient - it cannot detect the presence of the offensive cannabinoids in the resin. The Dequinois Levin (DLT) and the Thin Layer Chromatography (TLC) tests were designed to do this. But the crucial point is this: both the DLT and TLC tests (and the other two tests as well) were not then employed by Government Chemists to quantify the presence of cannabis resins or cannabinoids. Considering the manner PW1 had testified - in conjunction with the above technical factors - he was, in his second test, obviously looking principally for the morphological features (glandular and systolithic hairs) in the plant material rather than the extent of cannabis resin present. I was thus driven to find as a fact that he had not directed his mind on the **quantitative** presence of cannabis resin in his second test despite his assertions to the contrary. As, I had readily agreed that the question of non-extraction of cannabis resin under s. 2 of the DDA is a matter of science [see Loo Keck Leong (*ibid*)], I cannot, in good conscience, (in view of my earlier finding that PW1 had neither directed his mind to nor evaluated this aspect in his analysis) even now hold that PW1 had found, in a scientific manner cannabis resin which is "more than insignificant traces" or "which is large enough to be used in a manner prohibited by the Act." Though, I must hasten to add, it is self evident from my said judgment that I was satisfied that PW1 had found from DLT and TLC tests, the presence of cannabinoids in the plant sample. Admittedly, with this Court's acceptance that PW1 had found the presence of cannabinoids in the resin of the plant sample from P3 to P10, it would be highly incredible and inconsistent with common sense to hold that presence of cannabis resin could not have been "more than insignificant traces" or "'large enough to be used in the manner prohibited by the Act", **had PW1 examined them with the view to determining this issue.**

However, the "highly incredible" approach (permissible when considering whether to call for the defence but notably, thrown overboard by Khoo Hi Chiang (*ibid*)) was never at any rate, a test to apply - even ante Khoo Hi Chiang - when the Court decides at the end of the defence case whether to convict. And, whether the scientific approach postulated in Loo Keck Leong (*ibid*) concerning the non-extraction of cannabis resin should override the common sense approach? I shall not venture to provide an answer.

As I have said in my said judgment, the Supreme Court decision in Loo Keck Leong was a perceptive decision on a novel issue, and its dictum in the Supreme Court decision (on appeal from my said decision) that the cannabis resin in the plant sample should be large enough to be used in a manner prohibited by the Act, is a logical sequel to the Loo Keck Leong decision. Indeed, the new definition in s. 2 of the DDA requiring the presence of cannabis resin "irrespective of its quantity " should now be read in the light of the dictum in the said Supreme Court decision, being "not just that the plant material contained some cannabis resin however minute, but that which is large enough to be used in a manner prohibited by the Act." But the thought wrenching and brutal question I was confronted with (given the peculiar and invidious

circumstances obtaining when PW1 gave evidence, before the acute and rapt attention of this Court) is: how do we apply the above decisions to cases where Government chemists had conducted their tests pre Loo Keck Leong when the standards and requirements by the Courts on the analysis of the plant material were different. And, as quantification tests for cannabis resin was then non-existent or were never employed, it would require unusual courage or perhaps superhuman qualities for Government chemists to be able to expunge altogether from their minds the *ratio decidendi* in the Loo Keck Leong decision. Here, in this case I had unfortunately found that PW1 had succumbed to this human frailty. Indeed, the chemist in *PP v. Ibrahim Arifin (ibid*) had candidly admitted that soon after the Loo Keck Leong decision he had attended a meeting of Government chemists to discuss the evidential ramifications of the decision in the case. Be that as it may, though Mr Karpal Singh's contention in A (1) (which somewhat revisited an old issue) is understandable, yet it is neither pertinent nor permissible now for this Court to reconsider an issue which the Supreme Court has already laid to rest in the appeal against my decision. I therefore reject this ground.

In regard to contention A (ii)

I had not expressly laid out in my said judgment, my evaluation and findings in regard to the circumstantial evidence of possession, control and custody made out by the prosecution against the defence, which I should have done. I cannot now do so retrospectively, to accord with the subsequent decision in Khoo Hi Chiang (see my post-Khoo Hi Chiang judgment in Goh Kim Looi [1994] 2 CLJ 809. Yet, considering the fact that I had not found any of the prosecution witnesses, save PW1, to be lying in material particulars, I was satisfied at the end of the case for the prosecution, that if their evidence (other than the evidence of PW1) remained unrebutted, the circumstantial evidence would have been strong enough to warrant a conviction of the accused on a beyond-reasonable-doubt basis.

In regard to contention B

Though I agree that in order to convict an accused on circumstantial evidence it is desirable for the Court to be guided by the best evidence rule - in this case, to call for fingerprint evidence (see *PP v. Chee Kon Fatt* [1993] 3 CLJ 2564) - yet - I am of the considered opinion that such fingerprint evidence is not a strict requirement even in such cases. The best evidence approach in this aspect of evidence is only essential when the circumstantial evidence is such that it may give rise to some doubt as to the accessibility of the offending items to other persons besides the accused.

In regard to contention C

In Leong Bon Huat (*ibid*) the chemist who gave evidence at the trial had said that he took samples from various positions of each layer of the dried plant material, but did not say that his visual examination had shown that the plant material was of the same type and physical features as that of cannabis. Whereas, the present case is clearly distinguishable as PW1 had stated as follows:-

> From my physical examination it showed that they were all of the same type of plant material. I broke them up into thin slices to reach this conclusion. Only then did I take random samples. For physical examination I did this respect of every package. They were all of the same type of plant material. I took random samples from inside as well as outside of the 8 packages consisting of flowers, stalks, leaves and seeds.

Thus, the principle enunciated in Leong Bon Huat is clearly inapplicable here. This being so, I find no merit in the defence contentions in A, B and C above.

I now come to deal with the defence contention in D above.

I am mindful that the duty of this Court is to consider carefully the truth of the cautioned statement (D14) of the accused and the weight to be given to it. (See *Ramaya v. PP* [1986] 1 MLJ 301).

Several case-authorities have been cited by the defence for the proposition that if an accused had made a cautioned statement which was consistent with material particulars of his evidence in Court, this should be considered in his favour when considering whether he has raised a reasonable doubt against the circumstantial evidence led by the prosecution (or has discharged on the balance of probability, the presumptions raised by the prosecution.) (See *PP v. Choo Yee Keang* [1991] 3 CLJ 2909 - statement made on date of arrest and *PP v. Lim Ah Bek* [1989] 2 CLJ 1090 - statement

made on the night of arrest). The test to apply would be whether the accused's story is probable rather than possible. It would be sufficient even if there are some doubts in the Court's mind whether the accused was telling the truth. [See *Mohd Radhi bin Yaakob v. PP* [1991] 3 MLJ 169 and *Mat v. PP* [1963] MLJ 263.]

The accused did not deny that he was, at the material time of arrest, the sole occupant of the said car wherein exhibits P3 to P10 were found, but contended that at all material times he was labouring under the belief that he was conveying keropok in the boot of the said car. The Court is mindful that in the instant case the accused made his statement (D14) at 11.25 am on 12 August 1987 whereas he was arrested on 5.30 am on 11 August 1987 which gave him sufficient time to concoct the story about his transportation of keropok.

Even if a cautioned statement is made immediately after an arrest, yet the Court would have to consider whether the story of the accused in his statement as corroborated by his testimony in Court is probable, even if not compellingly credible in the circumstances. The answer in the current case is in the negative for the following reasons. [See *Kahar a/l Tongah v. PP* [1992] 4 CLJ 1865].

Though the material portions of his statements in D14 appear to corroborate his testimony in Court, yet his story was riddled with inconsistencies when compared and marked by absurdities even when consistent - the one with the other statement. He said that he was paid RM300 by Encik Mat for the service rendered yet he could not explain why according to ASP Abdul Wahab bin Embong (PW3), only RM63 was found by him in accused's pocket wallet, as shown in the search list served on the accused on the morning of the arrest. In D14 the accused had said that he was asked to convey keropok to Che Mat's brother Encik Osman in Kuala Lumpur whereas in his evidence he testified that the keropok was to be conveyed to one named Osman in Kuala Lumpur. It is also wholly incredible for the accused not to have examined the contents in the boot of the said car before he set out on the long journey to Kuala Lumpur.

Here the accused would have the Court accept his story that he went to Che Mat's house at 7.00 pm from Taiping, arrived at 10.00 pm and slept there alone until 5.00 am the next morning in order to transport keropok to Che Osman in Kuala Lumpur for a fee of RM300 whereas only RM63 was found in his pocket at the time of arrest. Oddly, why was his suspicion not aroused when he was not permitted to accompany Che Mat - on the trip which took about 7 hours - to "pick-up the keropok"? Also, he was supposed to be doing keropok business but not transportation (of keropok to Encik Osman) business. PW6 had testified that her husband was with her for the whole day until 7.00 pm on the day previous to his arrest whereas the accused had said that PW6 was not with him when he left the house as she had already left their house at 5.30 pm that day. His story is highly incredible and wholly improbable; all the more so in view of the not insignificant gaps between his statement in D14 and his testimony. The nature and structure of keropok and cannabis couldn't be more different; one being fishy and the other, grassy - more different than butter from cheese. The character Che Mat was a figment of the accused's imagination plucked from the air while he was obliged to sit in the lock-up.

Furthermore, if the character of Che Mat existed then it is incumbent on the defence to put this question to the investigating officer of the case PW8 [See *PP v. Lin Lian Cheng* [1992] 1 CLJ 20861]; in as much as the question of RM300 allegedly taken by the police should also have been put to the prosecution witnesses. It is settled law that the defence, by its failure so to put such questions to the prosecution witnesses ought not be allowed to raise such issues at the defence stage. Prosecution witnesses were also not challenged as to whether the police had taken steps (at any rate, not necessarily fatal to the prosecution case) to check on the telephone number given in D14 or to locate Che Mat's house with the assistance of the accused and this became the issue only during the defence case. [See *PP v. Lin Lian Cheng* [1992] 4 CLJ 2086 and *PP v. Saddali Bin Sariol & Anor.* [1993] 3 CLJ 263].

I do not in all the circumstances find the explanation given by the accused reasonable or as having constituted any reasonable doubt on the prosecution's case. Having carefully studied the oral evidence and the cautioned statement as a whole, the explanation given by the accused is not only improbable and unreasonable but also inconsistent with innocence. See

PP v. Datuk Haji Harun and *Mohd Radhi bin Yaacob v. PP.*

The creditworthiness of the testimony of the prosecution witnesses could not be faulted by the Court. They have succeeded in building an absolutely overwhelming circumstantial case of exclusive possession, custody, control and knowledge of P3 to P10 against the accused, which the accused has not succeeded by testimony and D14, in raising a reasonable doubt to acquit himself.

For all the above reasons, I find the accused guilty as charged and I now pass the mandatory death sentence on him.

PUBLIC PROSECUTOR

v.

NASSER AGHAEI

HIGH COURT, SHAH ALAM
DATO' K.C. VOHRAH J.
[CRIMINAL TRIAL NO. 47-32-1992]
30 APRIL 1994

CRIMINAL PROCEDURE: Charge of trafficking in cannabis - Dangerous Drugs Act 1952 (Revised 1980) s. 39B(1)(a) - Burden of proof - Accused ordered to enter defence - Court doubtful whether accused was telling the truth - Whether accused could still be entitled to an acquittal.

The accused, an Iranian national, was charged with an offence under s. 39B(1)(a) Dangerous Drugs Act 1952 (Revised 1980) for trafficking in 978.53 grammes of cannabis resin at Gate 12, Terminal One, Subang International Airport. The offending item, as the evidence seemed to suggest, was recovered by the airport police from the inside pocket of a jacket which the accused was either wearing or carrying at the material time and place. In his defence the accused in effect said that the jacket belonged to another Iranian by the name of Ali Askari who asked him to hold the jacket when he (the said Ali Askari) went to the toilet. The existence or otherwise of Ali Askari, however, had never been proved.

There was no dispute to the fact that when asked by the security officer PW6 as to the content of the jacket the accused answered "My freind! My freind!". The accused however contended that what he actually said to PW 6 was "I don't", meaning that he did not know, and also "My freind! My freind! Just a moment", meaning that the jacket belonged to his freind and that he wanted the police to give him a moment to bring his freind. Apparently what transpired at the scene was recorded by a video camera stationed at Gate 12 but there was no evidence to show that someone had in fact seen the video tape or that the incident had in fact been so recorded. In any event the monitor tape on that day had been destroyed during a fire which occured on 15 October 1992.

The main issue was whether the defence as pleaded by the accused had raised a reasonable doubt in the case for the prosecution.